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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S REPLY TO THE JOINT APPEAL OF
WCTL'S MEMBERS OF THE FEBRUARY 27, 2012 DECISION BY THE
DIRECTOR, OFFICE OF PROCEEDINGS**

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BNSF Railway Company ("BNSF") hereby replies in opposition to the Joint Appeal of Ameren Energy Fuel & Services Company; Arizona Electric Power Cooperative, Inc.; Austin Energy; Cleco Corporation; CPS Energy; Entergy Services, Inc.; Kansas Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; and Wisconsin Public Service Corporation to February 27, 2012 Decision by the Director, Office of Proceedings ("Appeal of WCTL Members"), filed March 1, 2012.

I. INTRODUCTION

The Appeal of WCTL Members asks the Board to overturn a February 27, 2012 decision by the Director of the Board's Office of Proceedings ("Director's Decision") finding that the member companies of Western Coal Traffic League ("WCTL's Members") "are subject to discovery in this proceeding under the Board's subpoena power. . . ." Director's Decision at 1. The Director's Decision instructed BNSF and WCTL's Members to confer over the scope of discovery, set a date for a technical conference to discuss discovery issues, and held the

procedural schedule in abeyance while the discussions took place. *Id.* at 4-5. WCTL's Members ask that the Board "vacate the Director's Decision in its entirety." Appeal of WCTL Members at 16. WCTL's Members subsequently asked that the Board postpone the scheduled technical conference until their appeal is resolved.¹

The Appeal of WCTL Members should be denied. WCTL's Members acknowledge that the Board's review of the Director's Decision is subject to a "highly deferential standard of review." Appeal of WCTL Members at 6. They present no valid reason to overturn the Director's Decision, let alone a reason that meets the demanding standard for overturning a decision by a Board employee.

The Director of the Board's Office of Proceedings ("Director") correctly found that the information sought by BNSF from WCTL's Members is relevant to the issues that have been raised by WCTL in this proceeding. WCTL's Members do not dispute this finding. Nor do WCTL's Members dispute the Director's conclusion that the WCTL Members "have a clear interest in the proceeding . . . [that] is neither derivative nor indirect." Director's Decision at 2. Instead, the WCTL Members argue that the Director applied the wrong legal standard and failed to determine whether BNSF had a "very strong foundation" for its discovery requests, a standard that, according to WCTL's Members, applies to all discovery requests directed to *any* non-party, regardless of the connection of that non-party to the litigation.

WCTL's Members misread existing law. The Board does not apply a rigid "very strong foundation" standard to all non-party discovery requests. The Board assesses requests for discovery from non-parties under a more flexible approach in which the Board considers the relevance of the requested information to the issues in the case and the reasonableness of

¹ See WCTL Members' Joint Petition to Postpone the March 13, 2012 Technical Conference, STB Docket No. 35557 (filed March 2, 2012).

imposing discovery burdens on the non-party in light of, among other things, the non-party's interest in and connection to the litigation. The Director's decision to require WCTL's Members to respond to BNSF's discovery requests was clearly appropriate under the Board's existing case law. This proceeding was initiated as a result of filings made by WCTL on behalf of WCTL's member companies. The issues raised by WCTL implicate facts that are in the possession of WCTL's Members. BNSF asked WCTL to produce that information on behalf of WCTL's Members, but WCTL flatly refused to cooperate or to consider possible compromises. As a result of WCTL's uncompromising position, BNSF was forced to seek the information directly from WCTL's Members.

Shippers cannot expect to challenge the reasonableness of a railroad's rules and then avoid producing any information from their own files relating to the grounds for such a challenge. The Board has never endorsed such a one-sided approach to discovery. WCTL's Members' overblown rhetoric about "retaliatory discovery" and the "chilling effect" on participation in Board proceedings cannot obscure the fact that BNSF is seeking factual information relevant to the issues that WCTL has raised in this proceeding from the real parties in interest in the proceeding. The Director's decision was appropriate and should be upheld.

II. BACKGROUND

BNSF explained the background to this discovery dispute in its request that the Board issue subpoenas to WCTL's Members. *See* BNSF Railway Company's Petition for Subpoenas at 2-4 (filed Jan. 27, 2012). As BNSF explained, this proceeding resulted from a motion by WCTL, on behalf of its member companies, to enjoin BNSF's Coal Loading Rule.² In that pleading, WCTL submitted a verified statement by one of WCTL's Members that made a

² BNSF's "Coal Loading Rule" refers to Items 100, and Appendices A and B thereto, of BNSF's Price List 6041-B, as issued on July 14, 2011 and subsequent iterations thereto.

number of factual assertions about the impact of BNSF's Coal Loading Rule on coal shippers. While the Board did not enjoin BNSF's Coal Loading Rule, the Board initiated this proceeding to address a number of the issues that had been raised by WCTL.

Shortly after the Board initiated this proceeding, WCTL served discovery requests on BNSF. WCTL's requests covered a range of subjects, including requests regarding compliance costs and communications with mines and suppliers of coal dust suppression products and services. *See Coal Shippers First Set of Interrogatories and Document Requests to BNSF Railway Company*, which is attached as Exhibit 3 to BNSF's Petition for Subpoenas, RFP 9 ("analyses of coal dust emissions from coal cars"), RFP 11 ("analyses relating to costs to comply" with the Coal Loading Rule), RFP 14 ("communications BNSF has had with coal shippers" relating to the Coal Loading Rule), RFP 15 ("communications BNSF has had: (a) with surfactant suppliers; and (b) with suppliers of any other method of coal dust suppression"), RFP 16 ("communications BNSF has had with coal suppliers" relating to the Coal Loading Rule), and RFP 8 (documents relating to the "adverse impacts" of coal dust suppression products).

BNSF agreed to produce responsive information to most of WCTL's discovery requests and has, in fact, produced massive amounts of documents and data in the short time period allotted for discovery. BNSF has produced more than 336,000 pages of materials to counsel for WCTL and 509,000 video and picture files. In addition, BNSF voluntarily agreed to collect and produce materials from its two primary outside coal dust consulting firms, Simpson Weather Associates and Conestoga-Rovers Associates, that relate to the coal dust consulting activities that those firms performed for BNSF.

BNSF also served discovery requests on WCTL. Most of BNSF's discovery requests sought the same type of information that WCTL had requested from BNSF. BNSF asked for

information directly in the possession of WCTL and also asked WCTL to respond to the discovery requests on behalf of its member companies. WCTL refused to collect or produce any information from its member companies. *See Responses and Objections to BNSF Railway Company's First Set of Interrogatories and Requests for Production of Documents to Western Coal Traffic League* at 2; Jan. 17, 2012 Letter from Messrs. Slover, LeSeur, Kolesar and Pfohl to Mr. Samuel M. Sipe, attached as Exhibit 5 to BNSF's Petition for Subpoenas. BNSF therefore moved to compel WCTL to produce the requested information from its members. *See BNSF Railway Company's Motion to Compel Discovery From Western Coal Traffic League*, STB Docket No. 35557 (filed Jan. 27, 2012). As an alternative, BNSF requested that the Board issue subpoenas to WCTL's Members. *See BNSF Railway Company's Petition for Subpoenas*, STB Docket No. 35557 (filed Jan. 27, 2012). In the February 27, 2012 Director's Decision, the Director found that WCTL's Members are subject to discovery and stated that the Board would issue subpoenas after the parties met to discuss the scope of BNSF's discovery requests.

In their appeal, WCTL's Members claim that the discovery that BNSF seeks from them is broad and burdensome. They misleadingly claim that BNSF has propounded "a total of 144 separately numbered document production requests." *Appeal of WCTL Members* at 4. Each set of discovery requests to a WCTL member is actually limited to 9 requests for production of documents – 9 times 16 (the number of WCTL members) is 144. Moreover, the scope of BNSF's discovery is reasonably narrow. BNSF's requests cover the following topics, which are clearly relevant to the issues in this proceeding:

- Documents relating to the release of coal dust while the coal is in transit by rail. (RFP 1.)
- Documents relating to the costs and effectiveness of coal dust suppression products. (RFP 2.)

- Documents relating to shippers' activities and plans to apply coal dust suppression products. (RFPs 3 & 4.)
- Documents relating to the effects, if any, that coal dust suppression products have on railroad or shipper employees and property, or on power generation. (RFPs 5 & 6.)
- Documents relating to communications between WCTL or its members and any other person regarding BNSF's Coal Loading Rule. (RFPs 8 & 9.)
- Documents relating to coal dust suppression products used to manage coal dust in coal handling and storage at utility generating stations. (RFP 7.)

III. ARGUMENT

The Board has express statutory authority to subpoena "witnesses and records related to a proceeding." 49 U.S.C. §721(c). In the decision under review, the Director determined that the Board will issue subpoenas to WCTL's Members after the parties have had an opportunity to discuss the proper scope of such subpoenas. As WCTL's Members acknowledge, this decision by the Director is reviewed by the Board under a "highly deferential standard of review." *See Wisconsin Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42051, at 2 (STB served June 21, 2000). WCTL's Members have not presented any valid grounds for overturning the Director's Decision.

A. The Director Of The Office of Proceedings Properly Found That WCTL's Members Should Produce Relevant Information In Discovery

The subpoenas ordered by the Director in this proceeding are a legitimate means to create a level discovery playing field in this important case. The information sought by BNSF from WCTL's Members is directly relevant to the issues that WCTL has raised in this proceeding. Indeed, most of the discovery requests at issue here are similar to requests that WCTL propounded to BNSF. In their appeal, WCTL's Members do not dispute the relevance of the information that BNSF is seeking to the issues in this proceeding.

Moreover, BNSF tried unsuccessfully to obtain the information directly from WCTL. BNSF posed several interrogatories seeking information about various dust suppression actions, analyses and communications involving WCTL's Members, and WCTL repeatedly stated that "no member has informed WCTL" about the issue that was the subject of the interrogatory. *See Responses and Objections to BNSF Railway Company's First Set of Interrogatories and Requests for Production of Documents to Western Coal Traffic League at 9-11*, attached as Exhibit 5 to BNSF's Petition for Subpoenas. BNSF asked WCTL to produce relevant documents. WCTL produced to BNSF a total of 44 documents. Of the 562 pages of materials in those 44 documents, more than 540 pages were merely reproductions of publicly available documents, including the Board's decisions in *Coal Dust I* and public pleadings filed in *Coal Dust I*. WCTL expressly objected to collecting or producing any documents in the possession of its member companies on grounds that those companies are not formal parties to the proceeding. *See Responses and Objections to BNSF Railway Company's First Set of Interrogatories and Requests for Production of Documents to Western Coal Traffic League at 2*; Jan. 17, 2012 Letter from Messrs. Slover, LeSeur, Kolesar and Pfohl to Mr. Samuel M. Sipe, attached as Exhibit 5 to BNSF's Petition for Subpoenas. BNSF asked WCTL if it would be willing to discuss BNSF's requests for information from WCTL's members to see if some acceptable compromise could be reached, but WCTL refused even to discuss the possibility of compromise.

Against this background, the Director's finding that WCTL's Members are subject to discovery in this proceeding under the Board's subpoena power is fully justified, indeed compelling. The Director concluded that "BNSF's discovery requests are related to the subject matter of the proceeding and may lead to admissible evidence." *Director's Decision at 3*. The Director also concluded that it was permissible for BNSF to seek the information directly from

WCTL's Members in light of the fact that those companies "have a clear interest in the proceeding and will obviously be affected by its outcome. Indeed, the impact of this case on [WCTL's Members] is neither derivative nor indirect." *Id.* at 2. The Director also found that "the effects of the tariff on individual shippers are also known, in the first instance, by [WCTL's Members]." *Id.* These findings are beyond any dispute, and they clearly justify the Director's conclusion that WCTL's Members should respond to BNSF's discovery requests.

In their appeal, WCTL's Members repeatedly claim that by seeking relevant information from WCTL's Members, BNSF is engaged in "retaliatory discovery" against them. By "retaliation" WCTL's Members mean that BNSF identified them as candidates for discovery. But WCTL's Members cannot realistically expect to avoid an outgrowth of initiating litigation. WCTL, on behalf of its member companies, has put into play in this proceeding factual issues pertaining to BNSF's Coal Loading Rule. WCTL claims that it has no relevant information and is not obligated to obtain relevant information from its members. WCTL's uncompromising insistence that it would provide no discovery from its member companies left BNSF with only two options – BNSF could either forego obtaining any information in discovery from the parties that initiated the proceeding, or BNSF could attempt to obtain relevant information by asking the Board to issue subpoenas to WCTL's Members. BNSF pursued the latter option. By doing so, it is merely seeking information in discovery to which it is plainly entitled.

Whether they act directly or through an entity like WCTL, shippers that challenge the reasonableness of a railroad's rules must expect to produce factual information in the shipper's possession that relates to the grounds for their challenge. Litigation before the Board is not a one-way street, where only the railroad defendant must comply with discovery requests relating to the issues that have been raised. Contrary to the WCTL Members' claim, requiring shippers

to make available information in their possession related to allegations that they make against a railroad will not have a “chilling effect” on the pursuit of valid claims before the Board.

Participation in discovery by parties with an interest in the outcome of the litigation and with information relevant to the litigation is a central element of the litigation process and is the only means available to create a complete record.

There is no reason why the Director’s Decision should unduly constrain WCTL’s ability to participate in litigation before the Board in the future. The claims in some of the cases that WCTL initiates or participates in do not call for reciprocal discovery because information in the possession of WCTL’s Members is not relevant to the issues in the litigation. *See, e.g., Western Coal Traffic League – Petition for Declaratory Order*, STB Finance Docket 35506 (STB served Sept. 28, 2011) (addressing issues related to the acquisition of BNSF by Berkshire Hathaway); *Methodology to Be Employed In Determining the R.R. Industry’s Cost of Capital*, STB Ex Parte No. 664 (STB served Aug. 14, 2007) (addressing the methodology for calculating railroad cost of capital). But when WCTL brings a challenge to a railroad’s rule on behalf of its members and information in the possession of its members is relevant to the issues that WCTL has raised, it is appropriate to require WCTL’s Members to produce the relevant information in discovery. The Director’s conclusion that WCTL’s Members should respond to BNSF’s discovery requests was clearly justified.

B. WCTL’s Members Are Wrong In Claiming That The Director Failed To Apply The Correct Legal Standard.

WCTL’s Members argue that the Director erred by failing to show that BNSF had a “very strong foundation” for its discovery requests. Appeal of WCTL Members at 10. As a practical matter, this argument is unavailing even if a showing of a “very strong foundation”

were required to justify the issuance of subpoenas. For the reasons identified in Part III.A above, BNSF's request for subpoenas does indeed stand on a very strong foundation.

WCTL's Members also get the law wrong. According to WCTL's Members, the connection of the non-party to the litigation is irrelevant; the only question is whether the entity from which discovery is sought is a party or not and if discovery is sought from a non-party, a "very strong foundation" for the request must be shown. This argument misreads existing law and completely ignores recent Board precedents. In *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 41185, 2003 WL 23009129, at *1 (quoting 49 U.S.C. § 721(c)), the Board issued a subpoena for records from a non-party to the rate reasonableness proceeding, noting that the Board has statutory authority to subpoena information from non-parties "so long as it is 'related to a proceeding of the Board.'" The Board said nothing about a "very strong foundation" being required for the request. In *Wisconsin Power & Light v. Union Pac. R.R. Co.*, STB Docket No. 42051 (STB served June 21, 2000), the Board upheld a decision to issue a subpoena to a non-party consultant to the complainant, explaining that the railroad "should not be denied access to materials that may be useful in evaluating the credibility of [the consultant's] litigation forecasts." *Id.* at 4.³

In each case, the request for a subpoena was considered based on the specific facts of the case, where, among other things, the relevance of the information to the issue and the connection

³ See also *Pub. Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42057 (STB served Feb. 1, 2002) (subpoena issued to a non-party manufacturer of the fuel gauges installed on locomotives that measure fuel usage where the parties disputed the "reliability and accuracy" of the gauges); *Pyco Industries, Inc. – Feeder Line Application—Lines of South Plains Switching, Ltd.*, STB Finance Docket No. 34890 (STB served Oct. 5, 2006) (compelling discovery from a non-carrier parent company where its subsidiary relied on the parent company's loan commitment from a bank as the funds to purchase rail lines in the subsidiary's feeder line application); *E.I. DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125 (STB served Dec. 9, 2011) (issuing a subpoena to a non-party that operated a private truck fleet and was an affiliate of the complainant).

between the non-party and the litigation were considered. Thus, the Board has indicated that the reasonableness of imposing discovery burdens on a non-party turns to some extent on the relationship of the non-party to the parties in the case and the interest that the non-party has in the outcome of the litigation. In none of these cases did the Board apply the rigid standard that WCTL's Members claim governs non-party discovery. The Board has never stated or even implied that non-party discovery would be approved only if there was a "very strong foundation" for the requested discovery.

WCTL's Members ignore these recent decisions of the Board and rely instead on the 1987 decision by an ICC administrative law judge in *Asphalt Supply & Serv. v. Union Pacific Railroad*, ICC Docket No. 40121 (ICC decided Mar. 27, 1987) as evidence that "non-party discovery will be ordered only if the moving party presents a 'very strong foundation' in support of its request." Appeal of WCTL Members at 10.⁴ In *Asphalt*, the ALJ denied a request to issue a subpoena to the consignor of freight in a dispute between two railroads and the shipper responsible for the payment of the freight charges. In denying the request for a subpoena, the ALJ stated that the ICC has required a "very strong foundation before it will use its subpoena power to compel [documents] from a stranger to the litigation." *Asphalt Supply*, 1987 WL 98155, at *1. WCTL's Members claim that the ALJ's reference to a "stranger to the litigation" was meant to refer to any non-party. But there is no support for this reading of the ALJ's brief decision. In fact, it is clear from the decision that the entity from which discovery was sought was a "stranger" to the litigation in the sense that it had no interest at all in the litigation or the

⁴ In fact, several other ICC cases ordered third-party discovery without requiring a showing of a "very strong foundation." See *The TJX Companies, Inc. – Pet. for Declaratory Order – Certain Rates and Practices of Sweeney Transp., Inc.*, ICC Docket No. 41192, 1994 WL 178845, at *1 (ICC served May 11, 1994); *Dayton Power & Light Co. v. Louisville & Nashville R. R. Co.*, ICC Docket No. 37063, 1990 WL 287730, at *1 (ICC decided Aug. 9, 1990).

outcome of the litigation, unlike the obvious and undeniable interest that WCTL's Members have in the litigation here, which was initiated as a result of pleadings submitted on their behalf by WCTL.

Two other cases cited by WCTL's Members are equally unavailing. WCTL's Members cite *FMC Wyoming Corp. v. Union Pac. R.R.*, 3 S.T.B. 88 (1998), as a case in which a decision by a Board employee allowing third-party discovery was overturned on appeal. But the Board subsequently explained in *Wisconsin Power* that "in *FMC*, far from prohibiting third-party discovery, we permitted the taking of depositions of a nonparty consultant. . . ." *Wisconsin Power & Light*, STB Docket No. 42051, at 3 n.4. WCTL's Members also inexplicably cite *Arizona Public Service Co. & Pacificorp v. The Atchison, Topeka & Santa Fe Railway Co.*, 2 S.T.B. 367 (1997), a case that does not even deal with third party discovery.

C. The Issuance Of Subpoenas Would Not Impose Undue Burdens On WCTL's Members And Should Not Result In An Undue Extension Of The Schedule In This Proceeding

WCTL's Members also argue that the subpoenas should not be issued because "[r]esponding to non-party discovery is expensive and time consuming. . . ." Appeal of WCTL Members at 8. WCTL's Members cite a list of actions that must be taken to respond to discovery requests. *Id.* But the list is an unremarkable compilation of steps that must be taken by any entity responding to discovery requests. BNSF has undertaken the same efforts outlined by WCTL's Members with respect to a vastly larger set of document requests than those that BNSF has asked WCTL's Members to address. The supposed burdens associated with the subpoenas at issue here are no more than the normal burdens associated with administrative litigation.

WCTL's Members also complain that BNSF's discovery requests are "outrageously overbroad." Appeal of WCTL Members at 14. The Director acknowledged that WCTL's Members have made an overbreadth claim and instructed the parties to get together to discuss the scope of the subpoenas. This is also the normal and appropriate approach to narrowing the scope of discovery. Parties seeking information from other parties usually do not know in advance what documents will be reasonably available from the recipient of discovery requests. A meet and confer session is usually required to determine what can be collected and produced without undue burdens. BNSF made it clear to WCTL that it was willing to discuss the scope of its discovery requests to avoid imposing undue burdens on WCTL's Members.⁵

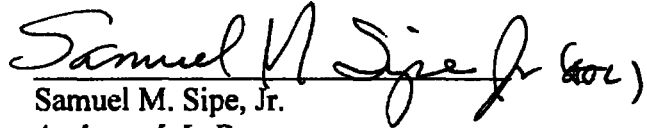
Finally, WCTL argues that the Director's Decision is inconsistent with the accelerated schedule in this case. Indeed, BNSF has a very strong interest in moving this case forward as quickly as possible. BNSF is concerned that the pendency of this proceeding will slow the progress that BNSF has been making in addressing the coal dust problem in the Powder River Basin. BNSF is anxious to get this challenge to the Coal Loading Rule behind it and to continue to make progress on the serious problem of coal dust fouling. Unfortunately, the dispute that led to the Director's Decision has made some delay in the schedule for filing of evidence unavoidable, regardless of how the Board resolves this appeal. BNSF will work diligently to minimize the extension of the schedule. But the fact that a modest extension of the procedural schedule will be required to obtain the requested information does not justify a reversal of the Director's Decision.

⁵ On March 2, 2012, WCTL's Members filed a request to put off all discussions about BNSF's discovery requests until the Board rules on this appeal. *See* WCTL Members' Joint Petition to Postpone the March 13, 2012 Technical Conference, STB Docket No. 35557 (filed Mar. 2, 2012). BNSF will respond separately in opposition to WCTL's Members' request to postpone the technical conference.

IV. CONCLUSION

For the reasons set out above, the Board should deny the appeal of WCTL's Members of the Director's February 27, 2012 decision.

Respectfully submitted,

A handwritten signature in cursive script, reading "Samuel M. Sipe, Jr." followed by a circled "for" in parentheses.

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Dated: March 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2012, I caused a copy of the foregoing to be served by e-mail or first-class mail, postage prepaid, upon all parties of record in this case as follows:

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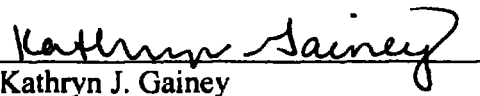
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